United States Senate
COMMITTEE ON SMALL BUSINESS
WASHINGTON, DC 20510–6350

June 28, 2002

The Honorable Angela Styles
Administrator, Office of Federal Procurement Policy
Office of Management and Budget
Room 352, Eisenhower Executive Office Building
Washington, DC 20503

Re: Competition in contracting review

Dear Angela:

As Ranking Member of the Senate Committee on Small Business and Entrepreneurship, I applaud the President's commitment to tackle the problem of contract bundling. Your efforts to translate the President's policy into specific actions are vital. I appreciate the work you have done in establishing the contract bundling and competition working groups, and I look forward to reviewing their recommendations. I would appreciate a full briefing on those recommendations as soon as they are decided.

The comments of the small business sector are indispensable in understanding these problems. Small business is a particularly energetic and innovative part of the Federal vendor base. We cannot maintain our defense readiness and homeland security without small business. I understand you conducted a very productive public meeting to hear small business views, and other public views, on June 14. I regret that my schedule did not allow me to attend, but in lieu of a personal appearance, I submit the following written comments on the matters raised in the *Federal Register* notice of May 6, 2002 (67 Federal Register 30403-04). For simplicity's sake, I will present these comments in the order discussed in the *Federal Register* notice.

Use of Other than Full-and-Open Competition. In remarks on March 19, the President stated his views on contract bundling and its effects on competition:

> And so one of the things we're going to do is we're going to examine the federal government's contracting policies, to make sure that they encourage competition as opposed to exclude competition; to make sure that the process is open; to make sure the process helps achieve a noble objective, which is more ownership in our country. And wherever possible, we're going to insist we break down large federal contracts so that small business owners have got a fair shot at federal contracting. [Applause]

Since those remarks were made, an effort has arisen to construe the President's views as endorsing a specific contracting strategy, of full-and-open competition. I am concerned that

those with a personal agenda, different from the President's, are attempting to read their views into the President's. "Full-and-open competition" is a term of art that refers to a specific contracting approach; it is not a term that the President stated. Instead, the President referred to the need to enhance competition in general. In my view, the President's remarks allow for other competitive approaches, not just full-and-open.

The Competition in Contracting Act (CICA), which emphasized full-and-open competition, nevertheless allowed for contexts in which that specific strategy might not apply. Long-standing provisions allowing even for noncompetitive contracts were left in-place. For example, agencies may award noncompetitive "sole-source" contracts whenever the need is of "unusual and compelling urgency that the Government would be seriously injured" or when "a statute expressly authorizes or requires that the procurement be made through another executive agency or from a specified source." 10 U.S.C. § 2304(c); 41 U.S.C. § 253(c).

Sometimes, noncompetitive contracting makes sense and is justified. In fact, small businesses participating in the Small Business Act's 8(a) program rely heavily on sole-source contracting as part of their business development plans. Accordingly, CICA did not do away with sole-source contracting.

If CICA allows even for noncompetitive contracting, it follows that CICA did not intend to do away with competitive approaches that fall somewhere between fully noncompetitive and full-and-open competition. This middle range includes such things as restricted competition, or "set-asides." In this approach, competition still occurs, but the competition takes place only among firms of a certain class.

For example, if a contracting officer has a reasonable expectation that two or more HUBZone firms will submit bids, he or she may "set-aside" the acquisition for HUBZone firms. The bids are evaluated competitively, but only HUBZone firms would be allowed to bid. Because the scope of competition is less than full-and-open, the contracting officer must also determine that the award can be made at a fair market price. Small Business Act, § 31(b)(2)(B). This meets the best of both worlds: the government is assured the contract would be awarded to a HUBZone firm, while ensuring competition among at least two firms.

This approach balances the value of competition with the government's desire to involve "historically underutilized businesses" in Federal contracting. Acquisition laws are complex precisely because of the number of competing values expressed in legislation. On the one hand, laws like CICA express the Congress' wish to enhance competition and to use market forces to control costs in government purchasing. On the other hand, the HUBZone Act of 1997 seeks to direct contracts to a particular class of business, those that locate in and hire from distressed areas. Because these distressed areas have a long-standing history of being excluded from the regular stream of commerce, the Congress made a determination that a special effort must be

made to direct contracts to small firms in those areas. The Congress included special tools, such as the HUBZone set-aside, to ensure that contracts would go to those firms.

The HUBZone set-aside allows the government to meet the legislative will, to bring jobs and opportunity to all our citizens rather than just to those who work at firms in prosperous areas. HUBZone firms often face higher costs and greater risks than firms in prosperous areas. They are outside the usual stream of commerce. They have access to fewer non-government customers than other firms. Their costs for renovating their principal office, for training HUBZone employees, for transporting goods and services to markets that are farther away from them, will be higher than for non-HUBZone firms. A HUBZone set-aside pits firms that are similarly situated against each other, rather than making them compete against large firms that do not face such added costs.

Without the HUBZone set-aside, the opportunity for contracts to go to these firms would be sharply diminished. Chronically distressed areas would remain chronically distressed. With the set-aside, small firms will be enticed into these distressed areas to participate in Federal contracting. They will hire employees who, in many cases, have never worked before. Since they will seek to become government contractors, these HUBZone firms will become part of the government's vendor base--thus enhancing long-term competition for Federal contracts. The HUBZone set-aside restricts competition to HUBZone firms on current contracts, but fosters greater competition for the future.

The HUBZone set-aside, in which competition takes place but is restricted to HUBZone firms, supports the President's agenda to enhance competition. True, it is not full-and-open competition, but the President did not specifically endorse that particular approach--notwithstanding the efforts of some to read their particular preferences into the President's comments. As long as Federal contracting recognizes circumstances in which noncompetitive contracting is permissible, even desirable, other approaches that provide competition but fall short of full-and-open must be accepted as well.

Competition in Simplified Source Selection for Acquisitions under the Simplified Acquisition Threshold. The Federal Acquisition Streamlining Act (FASA) of 1994 established the simplified acquisition threshold at $100,000 for both the Department of Defense (§ 4002) and for the civilian agencies (§ 4003). The very next section of FASA (§ 4004) further qualified the simplified acquisition threshold by creating a "small business reservation." To lessen concern about the small business impact of the new threshold, all purchases below that $100,000 threshold were "reserved" for small business (except purchases below the $2,500 micropurchase threshold). The only statutory exception to this reservation allowed these purchases to go to large firms if the contracting officer was unable to obtain offers from two or more small businesses that were competitive on market price, quality, or delivery terms.

As with the HUBZone set-aside discussed above, this small business set-aside allows the government to achieve conflicting goals. It still emphasizes competition, as the President prefers, but not on a full-and-open basis. It allows contracting officers to use simplified procedures, but balances that with an assurance that small business will get the first bite at the apple.

Because of this clear legislative policy, I am surprised that purchases from the Federal Supply Schedules are exempted from all small business requirements, including this statutory one. The Federal Acquisition Regulation, at § 8.404(a), exempts the Schedules from all the small business programs in Part 19 of the FAR, including the small business set-aside ("reservation") at § 19.502-2(a). I am uncertain what authority the FAR agencies had to make this exemption.

An agency that uses the Federal Supply Schedules is automatically "deemed" to have followed full-and-open competition procedures under §§ 6.102(d)(3) and 8.404, even though the procuring agency has made no effort to notify the public that a purchase is about to be made. It is odd that the Federal Supply Schedules allow contracting officers to bypass many of the requirements normally associated with full-and-open competition (such as notice that gives small business the opportunity to market themselves), but is nevertheless deemed to be full-and-open. However, a small business set-aside, which includes notice and which evaluates bids from small business on competitive basis, is deemed "restricted competition" to be avoided because it is not full-and-open. Further, the Schedules are exempt from this competitive small business approach, notwithstanding the small business reservation in FASA. The policy stated in the Federal Acquisition Regulation bears almost no relationship to the experience small business encounters in dealing with these two programs. I believe this nonsensical situation, of dubious statutory validity, is a prime candidate for review under the President's demand for greater competition and greater access for small business.

Limited Competition through Multiple Award Contracts. I am concerned that a growing portion of Federal procurement seems to be taking place through multiple award contracts, with likely harm to the vendor base and to small business participation. The typical scenario involves an agency that wants to establish a "reservoir" of pre-screened contractors for certain goods or services. For some needs, such as information technology (IT), the regular procurement processes have proved too time-consuming. By the time an agency would run through these processes, it would actually receive IT products or services that were a generation or more behind those available in the marketplace. Clearly some flexibility was necessary.

Accordingly, agencies have created pools of contractors that are pre-screened. They make a handful of awards to a small number of firms, saying that over the course of the contracts, the agency intends to buy their goods or services, but that the agency is not sure when or how much. When the agency is ready to buy the goods and services, it competes those individual task

and delivery orders only among the pool of contractors holding the multiple award contracts. This allows the purchases to be made faster when they are actually needed. However, it comes at the cost of locking out contractors who were not included in the original pool of awardees.

This useful tool may be expanding beyond its appropriate scope to harm the vendor base and to reduce competition. Multiple award contracts require the awardees to commit to a particular price on their goods and services, for the entire course of the contract--sometimes many years. This necessarily tends to favor large firms over small firms. Moreover, increasingly large dollar values on these contracts also tend to favor large firms, since the scope of such contracts tends to be large and sometimes beyond the ability of small firms to perform. It would be appropriate for multiple award contracts to be presumed "bundling" unless demonstrated otherwise, especially if the contracts are above certain dollar thresholds or for many years.

To the extent these high-dollar, multi-year contracts lock out small business, they do great harm to the vendor base. Firms not included in the original pool of awardees are locked out for the entire term of the contracts. If this extends for many years, these contractors will probably drop out of the Federal vendor base entirely. When the multiple award contracts expire, the agencies will find fewer vendors available to compete for the new contracts--resulting in higher costs and lower quality for the taxpayers.

Agencies should have clear guidance on when a multiple award approach is necessary, such as when a slower acquisition process would result in real losses to the government in acquiring current technologies. It may be appropriate to place an overall ceiling on the amount of an agency's contracting that may be awarded in this fashion, to make the agency prioritize its needs and use the multiple award approach only when truly necessary.

Agencies should not be allowed to use this process merely to reduce their workload. Maintaining and funding an adequate staff of trained acquisition personnel is essential. More particularly, an agency should monitor how large firms carry out their subcontracting plans, and failure to fulfill those commitments should be included in past performance reviews. This should have consequences not only when the multiple award contracts are expiring and new contracts are being awarded; in fact, failure to live up to subcontracting plan commitments should also be grounds for withholding additional task or delivery orders under the current contracts. Agencies must not use multiple award contracts to reduce their workload, then fail to oversee the contracts once awarded. Multiple award contracts can help an agency manage its procurement needs in a timely fashion--but they must not be used for the agency to abdicate its responsibilities.

Finally, I recommend that multiple award contracts--when appropriate--include an express set-aside for small businesses. One possible model is the ultimate strategy adopted in the Flexible Acquisition and Sustainment Tool at Warner-Robins Air Logistics Center in Georgia. If actual awards of task and delivery orders fall below a certain level of small business

participation, subsequent task and delivery orders must be competed only among small firms in the multiple award pool. Obviously, this means multiple award contracts must be awarded to at least two small firms (and preferably more) for this competition to take place.

Interagency Contracting through Government-Wide Acquisition Contracts (GWACs). The logic behind multiple award contracts has been wrongly extended to interagency purchases. Agencies that need information technology promptly have taken advantage of existing contracts held by other agencies and made purchases from their pre-screened pools of contractors.

However, by any reasonable standard, this is bundling. An agency that purchases off another agency's contracting vehicles is effectively abandoning its own vendor base. The agency would otherwise have bought goods and services using its own procurement vehicles. It decides, consciously or not, to abandon its own vendors. Further, holders of the GWAC contracts are even more likely to be large firms. GWACs inherently have a larger scope, since they will receive task and delivery orders from several agencies. This scope inherently favors larger firms that are able to perform these more complex and more demanding contracts. Users of GWACs also hope to drive prices down even further because of quantity discounts, quantities being larger due to the multi-agency scope. Locking in these low prices over many years is a commitment small firms have difficulty making.

The logic behind multiple award contracts held by individual agencies--faster acquisitions of fast-changing technology--is outweighed by the harm these interagency contracts exact on the Federal vendor base, and particularly small firms. These interagency contracts should be presumed bundling until demonstrated otherwise, and they should face a much higher standard of review to determine whether they are necessary and justified under the anti-bundling law.

Barriers to Small Business Participation. In the HUBZone Act of 1997, I included a 10% price evaluation preference for HUBZone firms relative to large firms in full-and-open competition. As with the HUBZone set-aside discussed previously, this preference reflects the higher costs incurred by HUBZone firms and seeks to level the playing field, giving these firms a real chance to win contracts while they advance the HUBZone program's goals of job creation and economic redevelopment.

The weight of this price evaluation preference has been undermined by the government's increasing reliance on best value contracting. The best value approach abandons a pure cost-based decision, to allow contracting officers to consider non-price factors in making a contract award. Since the price evaluation preference speaks only to price, the other factors can tend to override this intended benefit of the HUBZone program. It will be harder to award contracts to HUBZone firms. Without contracts, small firms will be less likely to move into HUBZones, thus abandoning the public good of reinvigorating our blighted areas.

Like many recent acquisition reforms, best value contracting was adopted for good and understandable reasons. Most consumers consider factors other than price when they make purchases. Factors such as higher quality or the strength of technical support can justify a higher price, both for government purchasers and average consumers. However, experience has shown ways in which this reform can be improved to ensure small business participation in best value contracts.

On January 28, the Small Business Administration published proposed rules to apply the HUBZone price evaluation preference in best value contracting. The proposed rule would require contracting officers to apply the preference against an otherwise-successful large bidder, in determining which bidder should be deemed the lowest bidder. This decision would then determine the allocation of evaluation points for the price factor in a best value appraisal. I support this change.

However, additional improvements can be made. The government, as a going concern, has a vested interest in maintaining a strong vendor base to ensure strong competition on contracts in the future. Further, the government should seek to disperse its contracting dollars widely, to avoid market distortions resulting from the government's presence in the marketplace. By awarding contracts to a handful of large firms, the government would foster consolidation and concentration in the private sector. The Small Business Act seeks to reduce the government's impact on the private marketplace by ensuring the government does not create artificial monopolies through its huge market position.

These public issues are not given any weight in a best value appraisal. These issues are undoubtedly a valid public concern, but the day-to-day decisions of contracting officers do not take account of this in best value contracting. Evaluation factors should be added to give credit to participants in small business programs, to encourage their continued development and their presence in the government's vendor base. The government need not sacrifice all other considerations by making this factor the deciding one; obviously, the immediate goal of the contract is to obtain the goods and services being bought. However, the current strategy of completely disregarding these long-term issues, in favor of exclusive emphasis on short-term questions, does not accurately reflect the competing values expressed in the different acquisition laws and especially the Small Business Act.

To support this approach, of making contracting officers conscious of how their decisions affect the strength of the vendor base, the data collected in the Federal Procurement Data System (FPDS) should be compiled to track the vendor base. The FPDS is currently being overhauled into a broader management tool, the Federal Acquisition Management Information System (FAMIS). Tracking the vendor base is essential to good management of acquisition. This new data system should report information on not only the contracts actually awarded, but on the number of bidders (especially responsive bidders) that responded to the solicitation. A drop-off

in the number of responsive bidders warns of trouble down the road as the vendor base shrinks. This is especially true if the drop-off occurs among small firms, since they are the main source of new entrants in the government marketplace.

Mitigation of Bundling; Studies and Articles on Bundling. The President's commitment to challenge bundling could not come at a better time. I constantly hear from small firms about how they are being harmed by bundling. When I conducted a women's business summit in Kansas City, in June of 2000, the complaints about bundling were vocal and persistent.

One of the best sources on bundling is a December 2000 study done for the Department of Defense Office of Small and Disadvantaged Business Utilization (SADBU) by the Logistics Management Institute. The study, "Case Studies in DoD Contract Consolidations," points to weaknesses that have developed in the current statutory definition of bundling. It demonstrates how agencies are avoiding the law's requirement to determine whether a proposed bundling is "necessary and justified" by finding reasons why their proposal is not technically bundling. The report also finds that the methodology for measuring costs and benefits of proposed bundling is not consistent across the government.

Improvements to the cost/benefit methodology should be implemented administratively. However, closing the loopholes in the bundling definition will require a statutory change. To this end, I have introduced legislation with Senator John Kerry, the Small Business Federal Contractor Safeguard Act (S. 2466). I encourage the Administration to support this measure. The current law is demonstrably weak. Opposing bipartisan legislation to remove those weaknesses is not a tenable position. Failure to support this legislation would undoubtedly be cited by Administration critics as evidence of a lack of seriousness on the issue. This would do a disservice to the President's personal commitment to tackle the bundling problem.

Thank you again for the opportunity to comment on the President's pro-competition and anti-bundling initiatives. I look forward to reviewing the working group recommendations as soon as they are available. If you have questions about this letter, please contact Cordell Smith of my Small Business Committee staff on

Sincerely,

Christopher S. Bond
Ranking Member